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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	PP Docket No. 93-253
Implementation of Section 309(j)	)	
of the Communications Act	)	
Competitive Bidding	)	

COMMENTS OF MOTOROLA INC.

Motorola Inc. ("Motorola") herewith submits its comments in response to the above-captioned Notice of Proposed Rule Making ("NPRM") to implement Section 309(j) of the Communications Act (the "Act"), as amended by the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"). In developing policies and procedures for competitive bidding of radio spectrum, Motorola believes the public interest dictates: (1) assuring the primacy of the FCC's role as a spectrum manager; (2) recognizing that for some services, like "Big" LEOs, competitive bidding is not an appropriate means of resolving mutual exclusivity; and (3) facilitating access to capital markets for new services in ways new to the Commission.

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November 10, 1993

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SUMMARY

On August 10, 1993, Congress enacted the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act").[1] Among other things, the Budget Act amends Section 309(j) of the Act to authorize the Commission to utilize competitive bidding procedures to license radio spectrum. This NPRM therefore requests comment on developing policies and procedures for determining when competitive bidding should be used and what form of competitive bidding is most appropriate under various circumstances.

Competitive bidding promises to recover for the United States the value of spectrum licensed to companies for commercial purposes. While this purpose is admirable, competitive bidding must ultimately be reconciled with the obligation to ensure the best and most productive use of spectrum. Even in situations where competitive bidding is permissible, the public interest objectives set forth by Congress must be met. In some cases, this may result in decisions not to have auctions. Motorola, as detailed below, has three public interest concerns about the implementation of competitive bidding.

First, as the Budget Act cautions, the implementation of competitive bidding does not and should not abrogate the Commission's ultimate responsibility to allocate, license, and ensure the use of spectrum in the public interest. Congress has made clear that it does not expect or intend that the Commission abdicate its highly important role as a spectrum manager in favor of maximizing Federal

[1] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

revenue. Thus, while the Commission is authorized to use competitive bidding to select from among mutually exclusive applications, the legislation does not allow the Commission to expand the universe of mutually exclusive applications for the sake of revenue. Instead, the Commission's panoply of policies, rules, and functions that exist to fulfill the FCC's obligation to license spectrum in the public interest, convenience, and necessity should remain intact.

A number of recent Commission proposals and actions clearly demonstrate that the Commission intends to continue exercising fully its role as a spectrum manager. Motorola is gratified, for example, that the Commission continues to work toward eliminating mutual exclusivity, and therefore the need for competitive bidding, in appropriate circumstances. The Commission has also developed stringent construction benchmarks for spectrum obtained in auctions, in both narrowband and broadband PCS allocations, to ensure the rapid deployment of services for the public. And, the Commission has sought to ensure the availability and accessibility of sufficient spectrum for private radio users through measures like the proposed exemption from bidding for 800 MHz general category channels and channels obtained through intercategory sharing. Continuing to fulfill these basic responsibilities is necessary and entirely consistent with Congress' clear intent that competitive bidding would not undermine the Commission's public interest mandate.

Second, it is inappropriate to apply competitive bidding to the Mobile Satellite Service ("MSS" or "Big LEO") applications now pending before the

Commission.[2] All of the non-geostationary MSS applications, including the one filed by Motorola Satellite Communications, Inc. for the IRIDIUM™ system, can be granted under various spectrum sharing plans, thereby avoiding a finding of mutual exclusivity. Of broader significance, however, is the fact that auctioning licenses for global MSS systems would not promote the primary objectives established by Congress when it passed the competitive bidding legislation. Further, serious adverse consequences will result from the overlay of a competitive bidding process to the longstanding regulatory policies underpinning the licensing of international satellite systems.

Third, the substitution of competitive bidding as the basic licensing vehicle for the Commission fundamentally alters the amount and timing of capital resources needed to launch new radio services. In effect, competitive bidding front loads significant spectrum acquisition costs onto a licensee who still must purchase the needed infrastructure and does not yet have a revenue stream. Because new services, such as Personal Communications Services ("PCSs"), are expected to generate expensive spectrum bids, Motorola is concerned that the demands on the capital markets may be strained to the point that funding for new entrants may prove difficult, if not impossible. Accordingly, Motorola urges the Commission to take affirmative steps to facilitate access to financing and suggests that the Commission consider allowing a limited security interest in an FCC license

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[2] Due to the importance of their service to Motorola, its satellite communications subsidiary, Motorola Satellite Communications, Inc., is submitting separate comments in this proceeding which highlight and expand upon the arguments contained herein.

as a way of addressing the capital formation concerns which arise with competitive bidding.

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I. IMPLEMENTATION OF COMPETITIVE BIDDING DOES NOT AND SHOULD NOT ABROGATE THE FCC'S RESPONSIBILITIES AS A SPECTRUM MANAGER AND ITS OBLIGATION TO ENSURE THE USE OF SPECTRUM IN THE PUBLIC INTEREST

In several recent Commission actions, the Commission has sought to ensure protection of the public's interest in the overall utilization of spectrum. The Commission has demonstrated that the advent of competitive bidding has not and should not alter the Commission's traditional spectrum management role in working with industries and individual companies to avoid mutual exclusivity. In both the narrowband and broadband PCS proceedings, the Commission has prudently continued to require build-out of systems by licensees who obtain spectrum in auctions. Further, consistent with Congressional intent, the Commission has sought to ensure that important private radio uses are protected from competitive bidding measures that may limit non-commercial users' access to needed spectrum. Motorola strongly supports these actions and urges the Commission to stay its course as a responsible manager of spectrum and trustee for the public interest. The discussion below addresses those policies which are critical to maintaining a proper balance.

A. The Commission Should Continue To Use Regulatory Solutions To Avoid Mutual Exclusivity

When Congress enacted the Budget Act, it expressly noted that nothing in the Budget Act affected the Commission's obligation to ensure the use of spectrum in the public interest. Specifically, the Budget Act states that competitive bidding authority shall not "alter spectrum allocation criteria and procedures established by the other provisions of the Act" and that "[i]n making a decision . . . to assign a band of frequencies to a use . . . the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding."[3] Similarly, the Budget Act limits the Commission's authority to consider potential revenues in rulemaking actions to implement competitive bidding,[4] and admonishes the Commission that it is not relieved of the obligation to continue to use the full range of regulatory tools to avoid mutual exclusivity in licensing actions.[5] These fundamental principles must guide all Commission decisions and policies for implementing competitive bidding.

The advent of competitive bidding as a means of resolving mutually exclusive licensing does not grant the FCC carte blanche to sell any spectrum to the highest bidder or grant an auction winner a "blank check" to use the spectrum in any way they see fit. Rather, as discussed above, it was the clear intent of Congress that competitive bidding would only enter into the Commission's decision making processes if and when mutual exclusivity arose. All other aspects of the

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[3] 47 U.S.C. §§ 309(j)(6)(A), 309(j)(7)(A).

[4] 47 U.S.C. § 309(j)(7)(B) ("In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues").

[5] 47 U.S.C. § 309(j)(6)(E) (the Budget Act shall not "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.")

Commission's spectrum management role--allocation, licensing, and use regulation--should continue to be driven solely by the public interest, convenience, and necessity.

B. Appropriate Construction Benchmarks Continue To Be Necessary

While Motorola agrees with and encourages regulatory flexibility to allow the broadest range of technical solutions, warehousing and inefficient use of limited spectrum resources should never be condoned. Indeed, one of the Congressional mandates in the Budget Act is to ensure "efficient and intensive use of the spectrum," and Congress explicitly directed the Commission to develop "performance requirements . . . to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum . . ., and to promote investment in and rapid deployment of new technologies and services."[6]

Under the circumstances, Motorola believes that measures such as Sections 99.103 and 99.206 of the Commission's rules, which require expeditious build out of licensed systems, continue to be both appropriate and necessary. If licensees have access to adequate financial resources, which can be assured through measures suggested below, no reason exists for allowing licensees to delay fulfilling their obligations to provide needed services to the public.[7] Performance

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[6] 47 U.S.C. § 309(j)(4)(B).

[7] Indeed, construction benchmarks assuring rapid deployment are consistent with the Congressional goal of facilitating the swift development of a national information infrastructure.

requirements have been and will continue to be an important deterrent to speculation and warehousing. Performance requirements should be retained for existing services and used for future licensing as well.

C. The Commission Should Continue To Protect the Interests of Private Radio Users

Motorola also strongly supports the Commission's proposals to protect the interests of private radio users. Since private radio users do not offer commercial service to subscribers, private radio users are unlikely to be able to compete with commercial mobile services in auctions for spectrum. Wisely, Congress has exempted such users from competitive bidding, and explicitly directed the FCC not to consider an expectation of auction revenues when making allocation decisions.

Even with Budget Act restrictions, the possibility remains that private radio users' access to spectrum could in some circumstances be limited by the prospect of bidding against commercial users. Accordingly, Motorola is gratified to see, and wholeheartedly supports, measures like the FCC's proposal to exempt 800 MHz General Category channels and channels obtained through intercategory sharing from competitive bidding measures.[8] The limited possibility of these frequencies being used for for-profit commercial service does not outweigh the detriment to private users that auctions would cause in terms of regulatory uncertainties and, potentially, reduced spectrum availability.

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[8] See NPRM at ¶ 139.

Motorola further notes that "MX" situations involving these frequencies may frequently be avoided through administrative procedures such as electronic filing and cross-coordination among multiple frequency coordinators. Additionally, there are ongoing efforts to apply these procedures directly to the 800 MHz General Category frequencies. These initiatives reinforce the legislative intent that competitive bidding not be applied to these services. They are also consistent with the Congressional directive to explore alternatives which avoid, where possible and appropriate, mutually exclusive situations.

II. COMPETITIVE BIDDING IS INAPPROPRIATE FOR MOBILE SATELLITE SERVICE BIG LEO SYSTEMS

In its Notice, the Commission requests comment as to whether it should use competitive bidding in licensing the current group of Big LEO MSS applications.[9] It notes that a "significant number" of MSS applications have been accepted for filing in the 1.6 and 2.4 GHz bands, and questions whether these pending "mutually exclusive" applications should be resolved by auctions or lotteries.[10] In Motorola's view, the Commission should not auction this spectrum since the pending applications are not mutually exclusive, and since the objectives of the competitive bidding legislation would not be served by using auctions for Big LEO applications. Moreover, the public interest would not be served by auctioning these licenses.

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[9] See NPRM at ¶ 155.

[10] Id.

A. The Commission Has Erroneously Assumed That the Pending Big LEO Applications Are Mutually Exclusive

The currently pending Big LEO applications are not, in fact, mutually exclusive. If the Commission were to apply any one of several spectrum sharing proposals currently before the Commission in CC Docket No. 92-166, all qualified non-geostationary MSS system applicants can receive authorizations without a hearing.[11] Since all qualified applicants would have an equal right to receive construction permits and licenses utilizing a spectrum sharing plan, a hearing is not required under Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), and therefore a finding of mutual exclusivity can be avoided.[12]

B. The Commission Has Failed To Recognize That the Competitive Bidding Legislation Requires That It Consider Alternatives to Auctions When It Is In the Public Interest To Do So

Newly enacted Section 309(j)(6)(E) states that the Commission is required:

> to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to

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[11] The Commission can dismiss the one geostationary system applicant on a number of policy and legal grounds, including its failure to offer true RDSS service as required by the Commission in its public notice accepting applications, and the fact that this applicant already has a license to provide MSS in other bands. It is well established that the Commission can promulgate by rule basic policies and qualification standards which eliminate otherwise qualified applicants without violating their Ashbacker hearing rights. See, e.g., Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289, 1294 (D.C. Cir. 1989).

[12] See Telocator Network of America v. FCC, 691 F.2d 525 (D.C. Cir. 1982) (Need for comparative hearings obviated where Commission indicated that it would award a license to every eligible licensee).

> avoid mutual exclusivity in application and licensing proceedings.[13]

As previously indicated, the spectrum sharing plans being considered in the Big LEO proceeding would avoid mutual exclusivity of the pending applications and would fit squarely within the items identified by Congress in the competitive bidding legislation for avoiding mutual exclusivity.

C. Many of the Objectives Outlined in Section 309(j)(3) of the Competitive Bidding Legislation Would Not Be Met If the Commission Were To Auction Off the Big LEO Spectrum

Competitive bidding would not promote the development and rapid deployment of new technologies, products and services without administrative or judicial delays. In fact, global MSS service would be provided to the public much sooner if the Commission were to adopt the spectrum sharing plans proposed by the applicants. In addition, the promotion of economic opportunity and competition as well as avoidance of excessive concentration of licenses would be better met by adopting a spectrum sharing plan that allows the marketplace to be

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[13] See also Conference Report of the Committee on the Budget, House of Representatives, to accompany H.R. 2264, Report No. 103-213, at p. 485 (Aug. 4, 1993). Congress clearly had the proposed Big LEO systems in mind when it added this language to the bill as reflected in House Report (H.R. No. 103-111, at p. 258):

> The ongoing MSS (or "Big LEO") proceeding is a case in point. The FCC has and currently uses certain tools to avoid mutually exclusive licensing situations, such as spectrum sharing arrangements and the creation of specific threshold qualifications, including service criteria. These tools should continue to be used when feasible and appropriate.

the ultimate decider of the number of systems that are economically viable, instead of relying upon a competitive bidding mechanism.[14]

D. Auctioning Spectrum Would Have a Significant Negative Impact Upon U.S. MSS Applicants and Threaten U.S. Leadership in Mobile Satellite Communications

Big LEO systems are inherently international in scope; U.S. Big LEO licensees expect to compete in the worldwide marketplace against other foreign systems that, in all probability, would not have to pay for gaining access to spectrum. Auctions in the United States would be an unfortunate precedent for other Administrations to follow for Mobile Satellite Service and auctions would certainly increase the costs of U.S. systems to operate around the world. Such a combination of events would place U.S. systems at a serious competitive disadvantage vis-a-vis foreign systems, and jeopardize the technological leadership of the United States in important satellite and mobile communications.

E. Global MSS Systems Must Obtain Licenses From Foreign Countries As Well As the U.S. To Provide Global Service

The Commission has failed to recognize that it will be virtually impossible for a global MSS licensee to determine the value of the spectrum that it is purchasing at the time that an auction occurs because the U.S. cannot guarantee that this

[14] Under at least one of the spectrum sharing plans currently under consideration by the Commission, the most efficient use of the spectrum would be guaranteed by only awarding licenses to those MSS applicants that actually begin operation and by adjusting spectrum assignments based upon relative need.

spectrum will be available on a global basis. Unlike the licensing of terrestrial PCS services, which is essentially a domestic matter, global MSS systems must be coordinated around the world on a bilateral basis and must also obtain licenses from foreign countries in order to provide service abroad.

For all of these reasons, Motorola urges the Commission to reject auctions as an acceptable means of licensing Big LEO applicants. At a minimum, the Commission should defer a decision on this issue until it establishes licensing and service rules for Big LEOs in a separate proceeding.

III. THE COMMISSION SHOULD TAKE STEPS TO FACILITATE ACCESS TO CAPITAL MARKETS FOR ENTRANTS INTO NEW WIRELESS SERVICES

A. Competitive Bidding Will Present Unique Financial Challenges For Licensees In Launching New Radio Services

The use of competitive bidding to resolve mutually exclusive licensing for new radio services is a fundamental change in how new radio services are deployed. Not only does competitive bidding involve significant added new costs for licensees, it also affects the timing of capital expenditures. Both of these factors could have a deleterious effect on the deployment of needed new radio services if bidders cannot obtain prompt, front-end financing. Accordingly, Motorola believes that measures to facilitate access to capital are warranted. In particular, Motorola submits that allowing creditors to hold limited security rights in radio licenses obtained through competitive bidding may be appropriate and publicly beneficial and urges the Commission to consider whether a limited security interest for creditors would be a positive solution to anticipated capital formation difficulties.

The Budget Act anticipates that competitive bidding will raise at least $10 billion in new revenue over the next five years alone. Much of this revenue is expected to result from the use of auctions in licensing new 900 MHz narrowband and 2 GHz broadband PCS. The payment of bids, however, is not the full extent of costs required in order to implement a new radio offering. Once payments have been made to secure spectrum, licensees will still be required to finance the infrastructure for new PCS systems--and potentially the relocation of existing users--before any revenue is realized. In the case of 2 GHz services, the costs of a PCS network have been estimated at over $700 per POP.[15] Thus, it is likely that the deployment of PCS under competitive bidding procedures will entail the largest ever expenditure of capital for a new radio service.

Competitive bidding will also have ramifications in the timing of capital expenditures. While some might argue that cellular radio services required the same capital investment in a "private secondary auction" of spectrum, there were some notable differences. First, cellular licensees' spectrum acquisition expenditures were spread over a greater period of time--not all market purchases were compressed into the same timeframe contemplated for auctions. Second, cellular licensees were in many cases content to purchase initially only majority

[15] Reed, David, "Putting It All Together: The Cost Structure of Personal Communications Services" at vi (FCC Office of Plans and Policy Nov. 1992).

interests in licenses, and therefore did not have to pay the full market value of the spectrum at once. Third, in some cases licenses were retained by the original lottery winners, who were then able to implement service without significant spectrum acquisition expenditures at all.

The financial picture for new PCS licensees, and other licensees in new services, will be quite different. All spectrum acquisition costs, which are contemplated to be substantial, will be compressed into a very short timeframe. In essence, the radio industry and its investors will be required to pay billions of dollars to acquire the spectrum for a new service that still requires technical and marketing refinement. And, while the radio industry may be able to assess the real prospects of PCS in the marketplace, capital suppliers may not have similar confidence; consequently, access to funding may become an artificial barrier to the introduction of needed services. Indeed, the Small Business Administration has noted that capital formation is presently one of the greatest barriers to participation in new radio services by small businesses and, presumably, by businesses owned by women and minorities. Thus, easing access to capital may have the greatest potential impact in an area where Congress has explicitly directed the Commission to increase opportunities.[16]

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[16] See, e.g., Report of the FCC Small Business Advisory Committee to the Federal Communications Commission at 2 (Sep. 15, 1993) (included as Appendix C to Amendment of the Commission's Rules To Establish New Personal Communications Services, FCC 93-451 (rel. Oct. 22, 1993)).

B. Allowing Lenders To Obtain Security Interests In FCC Licenses, Subject to Appropriate Limitations and Responsibilities, Should Be Considered To Facilitate Licensees' Access To Capital

Under the financial pressures of competitive bidding, the Commission should take steps to ensure access to adequate capital to develop PCS and other new services. Motorola believes that one means of accomplishing this goal may be to allow creditors to hold a limited security interest in licenses granted by the Commission in the competitive bidding process. By allowing creditors limited, but direct, security interests in the license itself, entities with the capital needed to finance the development of new radio services will be more willing to lend new licensees the funds necessary to complete acquisition, construction, and initiation of service.

One of the greatest disincentives to loaning money to FCC licensees is that under current FCC policies, creditors are able to take stock pledges, but such pledges do not guarantee lenders priority rights in bankruptcy commensurate with the risks they are asked to take. For example, In re Oklahoma City Broadcasting Co., d/b/a KGMC-TV, Debtor,[17] a bank was owed approximately $3 million by a bankrupt station on a loan secured by virtually all of the station's assets. A third party offered $3 million for the station, and the bank asserted a priority claim to all of the proceeds, arguing that the money reflected the fair market value of the assets as a going concern. The bankruptcy court disagreed, stating that the assets

[17] 112 B.R. 425 (Bankr. W.D. OK. 1990).

of a broadcast station, absent its FCC license, could not be valued on a going concern basis. The court instead valued the assets on a liquidation basis and allowed the bank a priority only as to $2 million of the proceeds from the sale. Obviously, the inability to secure loans against the real value of the system--on a going concern basis--has effects on creditors willingness to lend funds, especially for a service like PCS where substantial funds are advanced to obtain the license itself and would otherwise not be secured by any tangible assets.

Motorola also believes that the Commission could lawfully allow a limited security interest in radio licenses. The Communications Act, the Budget Act,[18] and Supreme Court precedent prohibit property rights in spectrum, not licenses. Indeed, in Bill Welch,[19] the Commission permitted the for-profit sale of an unconstructed facility and stated "[i]t is important to note that the fact that Section 301 provides that licensees may have no 'ownership' interests in frequencies does not mean that they have no rights in the license itself."[20] FCC licenses, whether or not the FCC permits creditors legally cognizable security interests, will remain subject to a number of federal controls, including license terms and restrictions on use. Under the circumstances, allowing creditors limited

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[18] Budget Act § 6002(a).

[19] 3 FCC Rcd 6502 (1988).

[20] Id. at 6505 n.27.

security interests will not impinge upon the FCC's authority of licensees in any way.[21]

If the FCC deems it appropriate to allow such limited security interests, however, Motorola believes that, in the event of foreclosure, creditors should be subject to performance and due diligence requirements similar to obligations undertaken by the licensee itself. Creditors should not be permitted to deny the public the benefits of new services by foreclosing on loans and selling the spectrum to the next highest bidder. Rather, lenders should be required to step into the shoes of the licensee and meet applicable construction and service benchmarks.[22] In this manner, the Commission would ensure the ultimate goal of providing new and needed services rapidly for the public.

IV. CONCLUSION

The implementation of competitive bidding entails both significant promises and risks for future radio services. The auctioning of spectrum is a fundamental change that must be approached carefully if spectrum is to continue to be used consistent with the public interest. Specifically, Motorola is reassured by--and supports--the Commission's efforts to create rules and policies that avoid mutual

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[21] In this regard, Motorola notes the existence of a pending Request for Declaratory Ruling by Hogan & Hartson on this manner. See Hogan & Hartson Petition for Declaratory Ruling that Lenders May Take a Limited Security Interest in an FCC License, MM Docket No. 92-51 (filed Feb. 21, 1991). In view of the significant changes since the petition was filed, however, additional public comment may be warranted.

[22] Any such policy, however, should recognize that if a business fails in the eleventh hour, that some flexibility may be necessary to avoid inequitably penalizing a creditor by revoking the authorization for failure to meet a deadline.

exclusivity, ensure that licensees construct and operate radio systems expeditiously, and protect private radio spectrum, such as the General Category and intercategory shared channels, from competitive bidding. These steps are appropriate safeguards of the public interest.

Motorola also believes that competitive bidding is inappropriate for licensing Mobile Satellite Service Big LEO systems. The Congressional directive to implement competitive bidding involves a careful weighing of each potential service and situation. The Commission has appropriately rejected an across-the-board adoption of competitive bidding as the sole licensing mechanism for the future. The public interest requires rejection of this approach in appropriate circumstances.

Finally, Motorola expresses concern that the capital demands placed on financial institutions by competitive bidding may restrict deployment of new services unless steps are taken to ensure licensees' access to sufficient funds. Motorola consequently has suggested acting to permit lenders to obtain limited security interests in FCC licenses. For the foregoing reasons, Motorola respectfully requests the Commission to adopt its proposed policies in its implementation of Section 309(j) of the Communications Act.